In the Supreme Court of the United States

Of America.

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JAMES D. MAHER
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LIEUTENANT COLONEL DANIEL C. STEARNS,
Complainant,

vs.

BRIGADIER GENERAL GEORGE H. WOOD,
Respondent.

MOTION, NOTICE AND BRIEF.

COLONEL HUBERT J. TURNEY,
COLONEL WILLIAM NATHAN MacCHESNEY,
FRANCIS J. WING,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO.

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MOTION.

Comes now the respondent, Brigadier General George H. Wood, by Colonel Hubert J. Turney, the Judge Advocate General, Ohio, and Colonel Nathan William MacChesney, the Judge Advocate General, Illinois (Francis J. Wing, of counsel), and respectfully moves the Court to advance this cause upon its docket for an immediate hearing upon the following grounds:

First: That it is a matter of great and general public interest to a large number of persons.

Second: That it is a matter of great interest to the government of the United States.

BRIGADIER GENERAL GEORGE H. WOOD,
By COL. HUBERT J. TURNEY,
COL. NATHAN WILLIAM MacCHESNEY,
FRANCIS J. WING,
His Attorneys.

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Respondent.

NOTICE.

Notice of motion is acknowledged and the prayer thereof is consented to.

LIEUTENANT COLONEL DANIEL C. STEARNS,
By HARVEY R. KEELER,
CHARLES W. PATTISON,
His Attorneys.

In the Supreme Court of the United States

Of America.

LIEUTENANT COLONEL DANIEL C. STEARNS,
Complainant,

vs.

BRIGADIER GENERAL GEORGE H. WOOD,
Respondent.

BRIEF.

This action is a test case brought by an officer of the National Guard against the Adjutant General of Ohio, who are nominal complainant and respondent, and involves the construction of five constitutional provisions, as follows:

Article I, Section 8, Paragraph 16, giving to Congress the power to provide for organizing, arming and disciplining the militia and reserving to the states the appointment of the officers thereof, and the authority for training the militia according to the discipline prescribed by Congress. The second amendment: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." The tenth amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Article I, Section 8, Paragraph 15, providing that "Congress shall have the power to provide for calling forth the

militia to execute the laws of the Union, suppress insurrections, and repel invasions." That portion of the preamble defining among the purposes of the Constitution "To provide for the general defense." The provision making the President of the United States commander-in-chief of such portion of the militia as may be called into federal service. The power granted to Congress to raise and support armies; and the powers inherent in national sovereignty with respect to national defense, and the preservation and protection of national honor.

The action seeks a construction with respect to the right of the President and Congress over the National Guard of the several states, and the status and legal relation of the officers thereof, to the War Department; and raises the further question whether the National Guard or organized militia may be used without the limits of the United States, as such. A recital of the questions involved, determination of which is sought in this case, is sufficient to demonstrate their magnitude.

The attention of the Court might properly be invited to the fact that this action seeks to define the military status and availability for duty, beyond the limits of the United States, of a body of trained officers and men in number about one hundred and twenty-five thousand, and composing more than half of the total armed, disciplined and equipped military strength of the United States. Further, by reason of the insufficient strength of the Regular Army, and by reason of the large number of these troops of necessity stationed in the Philippine Islands, Alaska, Hawaii, the Canal Zone, and elsewhere, and the further large number of troops serving in the coast artillery, it results that but a portion of the mobile regular army is available for foreign service in

the event of a condition arising where the use of troops beyond the limits of the United States is necessary.

If the National Guard, or organized militia, may be used, as such, beyond the limits of the United States, a large body of armed, trained and disciplined troops are immediately available. If, under the provisions of the Constitution referred to, they may not be so used but must be organized into volunteers, then, and in that event, an immense expenditure of money to accomplish the transfer, and the sacrifice of the time needful therefor, and a sacrifice of the time and attention of many officers to accomplish same, is necessary. If this necessity exist in law, it is of paramount importance that it be seasonably known and determined.

Conditions have arisen under which it may be necessary for such troops to be used, in their present capacity as the National Guard, or in the event such use may not lawfully be had, then their status changed to make them available for use beyond the limits of the United States before this cause might be reached in its regular order; and in the event that such use may be made, much will be gained in military preparedness and efficiency and a vast expenditure of money by the government averted.

Respectfully submitted,

COLONEL HUBERT J. TURNEY,
COLONEL WILLIAM NATHAN MacCHESNEY,
FRANCIS J. WING,
Attorneys for Respondent.

No. 647

FILED
NOV 30 1914
JAMES D. MAHER
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BRIEF.

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HARVEY. R. KEELER,
FRED. C. GEIGER,
Attorneys for Complainant and Appellant.

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Complainant,

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o

BRIEF.

o

STATEMENT OF FACTS.

This action is a test case brought by an officer of the National Guard against the Adjutant General of Ohio, who are nominal complainant and respondent, and involves the construction of certain constitutional provisions, as follows:

1. Article 1, Section 8, Paragraph 16, giving to Congress the power to provide for organizing, arming and disciplining the militia and reserving to the states the appointment of the officers thereof, and the authority for training the militia according to the discipline prescribed by Congress.

2. The Second Amendment: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

3. The Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by

it to the states, are reserved to the states respectively, or to the people."

4. Article 1, Section 8, Paragraph 15, providing that "Congress shall have the power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

5. That portion of the preamble defining among the purposes of the Constitution "to provide for the general defense."

6. The provision making the President of the United States commander-in-chief of such portion of the militia as may be called into federal service.

7. The power granted to Congress to raise and support armies; and the powers inherent in national sovereignty with respect to national defense, and the perservation and protection of national honor.

The action also seeks a construction with respect to the right of the President and Congress over the National Guard of the several States, and the status and legal relation of the officers thereof, to the War Department; and raises the further question whether the National Guard or organized militia may be used without the territorial limits of the United States, as such.

ARGUMENT.

It is first necessary to consider the dual aspect of the National Guard as organized with reference to the General Government and the state so organizing it.

The militia consists, in a general way, of all male citizens of the United States between the ages of eighteen and forty-five. This constitutes the unorganized militia.

The National Guard consists of that part of the militia which is organized under and by virtue of the authority of a state.

Anderson defines the word MILITIA as follows:

"The militia are soldiers enrolled for discipline, and not

for other military service except in time of insurrection, invasion and perhaps riot."

Under the Constitution of the United States, CONGRESS is empowered to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, RESERVING TO THE STATES, RESPECTIVELY, THE APPOINTMENT OF THE OFFICERS AND THE AUTHORITY OF TRAINING THE MILITIA ACCORDING TO THE DISCIPLINE PRESCRIBED BY CONGRESS.

Const. U. S. Art. 1, Paragraph 8, Subdiv. 16.

Until the militia has actually been called into the service of the United States, the state government may legislate as to its organization and control, subject, however, to the paramount right of Congress to legislate on the same subject; but when the militia has actually been called forth, and has entered into the service of the United States, the authority of Congress over it is exclusive.

It has been decided that the concurrent authority of the state over the militia ends, and the exclusive authority of the general government begins, when the militia has entered into actual service by arrival at the place of rendezvous.

Houston vs. Moore, 5 Wheat. U. S. 1.

This dual relation has been well considered by the Supreme Court of the State of New York in the case of People vs. Hill. The following is an extract from its opinion:

"But the main question argued before us in behalf of the relators relates to the constitutionality of the seventh section of the act of 1883, under the federal constitution and statutes. The claim, in brief, is that power in the State Legislature to authorize the disbandment of any part of the military force of the state is excluded by the provisions of the

federal constitution, and the Laws of Congress enacted pursuant thereto, relating to the militia. The power conferred upon Congress by Subdivision 16, Paragraph 8, Article 1, of the Federal Constitution, 'to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress,' does not exclude State Legislation upon the same subject; unless the power conferred on Congress is actually exercised. The power of legislation over the subject, after its adoption, was concurrent in the states and Congress, and the power of State Legislation remained until Congress, in the exercise of the power conferred upon it by the constitution, had legislated. State Legislation, in relation to the militia, is only excluded when repugnant to or inconsistent with federal legislation, enacted within the purview of the power conferred by the federal constitution as inconsistent which undertakes to supplement laws passed by Congress, covering the subject of the power, by annexing new qualifications or incidents not prescribed by the federal law. The general question was eleborately considered in the case of Houston vs. Moore, 5 Wheat. 15, which involved the question of the right courts martial organized, under the laws of state to punish delinquent militiamen. In the absence, therefore, of a law of Congress prohibiting it, or inconsistent with a state statute which authorizes the disbandment of a company of the National Guard, the order of the general term is not in contravention of the federal constitution. The acts of Congress in respect to the militia, commencing with the act of 1792, are now consolidated in the Revised Statuses of the United States, Section 1632 et seq. By these acts the militia comprised the whole population of the several states between the ages of 18 and 45 years. They provide for their enrollment and equipment, and their organization and ar-

rangement into divisions and other subordinate bodies, and that the discipline prescribed for the regular army shall be observed. The statutes are filled with details which are practically absolute in the actual situation. The system has grown up and prevails in most of the states of organizing therein under state authority certain bodies of men out of the great body of the militia, as a uniformed force known as the 'National Guard.' They are a part of the Militia of the state. Their limited number makes it possible to arm, equip, and discipline them more perfectly, and to bring them to a much higher degree of efficiency as a militia force than can be attained by the great body of the militia. They are always available in an emergency requiring the prompt exertion of the military power of the state and nation, and their usefulness was signally proved in the war of the Rebellion. The state assumes the burden of maintaining them. They are subject to the orders of the chief executive of the state as commander-in-chief, until called into the actual service of the United States. State Const. paragraph 2, Art. 2. They are organized and governed pursuant to state statutes, and are disciplined in substantial conformity with the discipline of the army of the United States. Laws 1883, c. 299, Paragraph 8. We perceive no reason to doubt the power of the state to organize the National Guard. Section 1630 of the United States Revised Statutes declared that 'the militia of each state shall be arranged into divisions, brigades, regiments, battalions, and companies, as the legislature of the state may direct.' The fact that but a portion of the militia have been so organized does not impair the validity of such organizations as have been made."

People vs. Hill, 126, N. Y. 497.

The Supreme Court of the State of Florida has discussed the attitude of the National Guard with reference to the state, and this discussion sustains the view that we have here urged.

"And this brings us to the question, is a company of state troops, regularly enlisted as a part of the militia of the state, in any sort or sense such a county institution of the county where its members individually reside as that the erection or maintenance of its armory in such county can properly be termed a county purpose?" Section 1 of Article 14 of our Constitution provides as follows: "All able-bodied male inhabitants of the state between the ages of eighteen and forty-five years that are citizens of the United States, or have declared their intention to become citizens theaeof shall constitute the militia of the state; but no male citizen, of whatever religious creed or opinion, shall be exempt from military duty except upon such conditions as may be prescribed by law." Section 2 of the same Article provides that "the legislature may provide by law for organizing and disciplining the militia of the state, for the encouragement of volunteers corps, the safe-keeping of the public arms, and for a guard for the state prison." Section 3 of the same article provides for the appointment by the governor by and with the consent of the militia. Section 4 of the same article provides that "the governor shall have power to call out the militia to preserve, suppress insurrections, or to repel invasion." Section 16 of Article 4 of our Constitution provides that "the governor shall appoint all commissioned officers of the state militia, including an adjutant general for the state. The Adjutant General shall be the chief officer of the governor's staff, with the rank of major-general. His duties and compensation shall be prescribed by law." Section 4 of Article 4 of the Constitution, provides that "the governor shall be commander-in-chief of the military forces of the state, except when they shall be called into the service of the United States."

"From these provisions of our organic law it will be seen that that instrument recognizes and provides for the militia as a state institution, of which the chief executive of the state is made the commander-in-chief, and it is designa-

ted therein as being 'the militia of the state,' and every able-bodied male inhabitant of the state, regardless of the county of his residence, between the ages of eighteen and forty-five years, who is a citizen of the United States, or who has declared his intention to become a citizen thereof, is made a member thereof; and it is made the duty of the legislature to provide by law for the proper discipline thereof, and, as a part and parcel thereof, to encourage volunteer corps. The arms which they are equipped are also recognized as being the public property of the state. The provisions of Paragraph 2 of said Article 14, providing for the state militia, also seems to contemplate that the legislature may, from the body of the militia, supply a guard for the state prison. If the state prison were fixedly established in any particular county, and a company of state militia were organized in such county exclusively of residents thereof, and such company were assigned to duty as a guard for such state prison, there could be no question but that the expense of housing and maintenance of such guard would be properly chargeable to the state. And this duty of action as a guard for the state prison seems to be contemplated by the Constitution as being one function of the militia of the state."

"Their other functions and duties are summarized in Paragraph 4, of Article 14, above quoted, as being subject to the call, not of a county or any local official, but of the governor, to preserve the public peace, to execute the laws of the state, to suppress insurrection or to repel invasion, not confined to any particular county or locality, but anywhere within the borders of the state. In a democratic form of government, like ours; the military establishment may be said to be the dernier resort of the governmental authority, that is never called upon except when all other civil authority fails and becomes powerless to preserve the might of governmental sovereignty, and is a power that should never be surrendered to an agency of the state, such as a county or municipality, but should be held, as our Constitution seems

to contemplate, subject to be wielded by the Supreme Sovereign arm of the state. Said Chapter 4684, Laws 1899, entitled; 'An Act to provide for and encourage the organization of the Corps of Volunteer Militia for service as a Land Force, etc.' provides that there shall be organized in this state, for service as land force, a body of militia composed of such able-bodied males between the ages of eighteen and forty-five years who are citizens of the United States, and who may volunteer and take the oath of enlistment. It provides further that the applicant for enlistment, and the certificate of physical fitness and oath of enlistment shall be forwarded promptly to the adjutant general by the commander of the organization in which the applicant enlists. It provides further that the body of the militia thus enlisting shall be known as the 'Florida Troops,' and shall be the first to be called into service by the commander-in-chief to preserve the public peace, to execute the laws of this state, to suppress insurrection, or to repel invasion, and shall be the first troops subject to any call of the President of the United States for the militia to execute the laws of the Union, suppress insurrections, and repel invasions. Section 4 of the same Act provides that the governor shall be the commander-in-chief of such Florida State Troops, and shall appoint all commissioned officers thereof, including an Adjutant General, and all officers so appointed shall hold office for four years. Section 40 of said Act provides that the State Troops, or any portion thereof, when called out to aid the civil authorities, shall be considered for the time being in actual service and shall be governed by such articles, rules and regulations as may be promulgated by the adjutant general for the government and discipline of the state troops. Section 43 of said Act provides that when 'when an invasion of, or insurrection in, the state is made or threatened; or whenever there exists a riot, mob, unlawful assembly, breach of the peace or resistance to the execution of the laws of the state, or imminent danger thereof, and

the civil authorities are unable to suppress the same, it shall be the duty of the commander-in-chief, or, in case he cannot be reached and the emergency will not admit of awaiting his orders, it shall be the duty of the Adjutant General to issue an order to the officer in command of the nearest body of state troops, commanding such officer to call out the troops under his command, and to proceed with all possible promptness to suppress the same." "From this and the other provisions of the law, statute and organic, referred to and quoted, it will be seen that the only or function that a body of state troops can be called upon, or are under any duty to perform, in any given county, is dependent in such county upon the happening there of any of the extraordinary contingencies that justify resort to military force, and their duties and functions are not confined exclusively to the county where its individual members reside, but can be called into play in any other county of the state wherever the same contingency may arise. No body of the state militia, in other words, has any prescribed function or duty to perform exclusively in or for any particular county in the state that it is not under equal obligation to perform in or for any other county of the state wherever the exigency may arise for its exercise. And whenever and wherever it is so called upon to act, it is there as the representative of the state's supreme sovereignty, and not as that of the county in which it acts. The place of residence of its individual members has nothing whatever to do with fixing its status as a county institution. The conclusion reached is that the militia of the state, and every part thereof, is essentially and necessarily a state institution, or, rather, an arm of the state government, resort to which can only be had upon the failure of all other governmental authority; and that it can be, and should be, in the very nature of things, wielded only by the supreme sovereign power of the state; that it is in no sense such a county institution or establishment as that any particular county can exclusively be either authorized or required

to impose taxes for its, or any part of its maintenance. It is essentially a state institution, taxation for the support and maintenance of which can be imposed only by the state. Hubbard vs. Fitzsimmons, 57 Ohio St., 436, 49 N. E. 477; Wasson vs. Wayne County, 48 Ohio St., 623, 17 L. R. A. 795, 32 N. E. 472; Sanborn vs. Rice County, 9 Minn. 273, Gil. 258; Taylor, McBean & Co., vs. Chandler, 9 Heisk. 349, 24 Am. Rep. 308; Statson vs. Kempton, 13 Mass. 272. 7 Am. Dec. 145; Hutchinson vs. Ozark Land Co., 57 Ark. 554, 22 S. W. 173; Jackson County vs. State, 155 Ind. 604, 58 N. E. 1037." State ex. rel. Milton vs. Dickenson, 44 Fla. 623.

In the State of Minnesota the relation of the National Guard to the state was discussed by the Supreme Court of Minnesota, and there the court said:

"All we deem necessary to say upon the first point is that, in our opinion, the evidence was plenary that the relator was a duly enlisted member of the State National Guard. Under our military code the active militia or national guard are organized and enrolled for discipline, and not for military service, except in time of insurrection, invasion and riot. The men comprising it come from the body of the militia of the state, and, when not engaged at stated periods, in drilling or training for military duty, they return to their usual avocations, subject to call when public exigencies require it, but may not be kept in service, like standing armies, in times of peace. While enrolled as soldiers of the state for the purposes aforesaid, they are neither "troops", within the meaning of section 10 of article 1 of the federal constitution, nor a standing army, within the meaning of section 14 of the bill of rights in the state constitution. Dunne vs. People, 94 111.120."

State ex. rel. Madigan vs. Wagener,
74 Minn. 518.

The Supreme Court of the State of Illinois has fully con-

sidered this question and laid down a rule that is controlling in the State of Illinois in the case of Dunne vs. the People. Extracts from that opinion are not out of place, and a few are here inserted. They are as follows:

> "The first proposition submitted against the validity of the act known as the "Military Code", is that the power of organizing, arming and disciplining the militia, being confined by the constitution of the United States to Congress, when Congress has acted upon the subject and passed a law to carry into effect the constitutional provision, such action excludes the power of legislation by the state on the same subject. This is not, in our judgment, an accurate—certainly not a full expression of the law. Two things must be assumed to maintain this proposition:
>
> 1st. That the constitutional provision in respect to the militia is of that character it can only be exercised by Congress, and that any state legislation would of necessity be inconsistent with Federal legislation under that article of the constitution.
>
> 2nd. That the constitution, itself, places a restriction, either directly or by implication, upon all State legislation in respect to the militia. Neither assumption is warranted by any fair construction of the Constitution of the United States, nor by contemporaneous explanations by writers whose authority is to be respected, or by any subsequent judicial determinations with which we are familiar."
>
> "Johnson, J., conceded fully that concurrent power of legislation over the militia existed in the States with the National government. Story, J., in the opinion he gave, was even more pronounced in the expression of similar views, and, in speaking of the power granted to Congress by the constitution to call forth the militia to execute the laws of the Union, and to organize, arm and discipline the same, "It is almost too plain for argument that the power here granted to Congress over the militia is of a limited nature, and confined to the objects specified in these clauses, and that in all other respects and for all other purposes the militia are subject to the control and government of the State authorities." All the judges concurred, as we understand their opinion, in the proposition that, when Congress has once acted within the limits of the power granted in the constitution, its laws for organzing, arming and disciplining the militia are supreme, and all

interfering regulations adopted by the states legislation is unconstitutional. That principle applies only where Congress has assumed control of the militia under granted powers, and does not militate against the construction uniformly given to the constitution by Kent and other writers, "That a State may organize and discipline its own militia in the absence of or subordinate to the regulations of Congress." It is only repugnant and interfering State legislation that must give way to the paramount laws of Congress constitutionally enacted. The cases that support this doctrine are numerous and of the highest authority."

Houston vs. Moore, 5 Wheaton, 1; Sturgis vs. Crowonshield, 4 Id. 122; Livingston vs. Van Ingen, 9 Johns, 507; Houston vs. Moore, 3 Ser. & Rawle, 170; Opinion of the Justices, 14 Gray 614; Gillman vs. Philadelphia, 3 Wall. 714; United States vs. Gruikshank, 92 U. S. R. 542; Blancherd vs. Russell, 13 Mass. 1, Caldee vs. Bull, 3 Dallas, 386; 1 Kent's Com. 265, 389. No case has been cited that holds a contrary doctrine, except Golden vs. Prince, 3 Wash. C. C. R. 313, and what was said by the same judge in Houston vs. Moore, supra. We are not aware that the opposite views expressed by Judge Washington in either of those cases have been followed by any court. In Houston vs. Moore, John, J., expressly controverts the proposition, "That within the scope Congress may legislate, the States may not legislate, and speaks of it as an exploded doctrine."

"Nor do we think the reservation of the power to the State, respectively, the appointment of the officers and the authority to train the militia according to the discipline prescribed by Congress as suggested by counsel, puts any restriction upon the States in respect to the concurrent legislation concerning the militia. Mr. Justice Story, in speaking of that clause of the constitution, says "That reservation constitutes an exception merely from the power given to Congress to provide for organizing, arming and disciplining the militia, and is a limitation upon the authority which would otherwise have devolved upon it as to the appointment of officers'. Obviously, that is all that clause of the constitution does mean, and we adopt as our own view what that able Jurist added: "The exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the States over the militia."

"The designation 'Illinois National Guard', ap-

plied to the active milltia, is a matter of no consequence, and the act will be construed as though it did not contain those words. That a State may organize such portions of its militia as may be deemed necessary in the execution of its laws and to aid in maintaining domestic tranquility within its borders is a proposition so nearly self-evident that it need not be elaborated at any great length. 'A well regulated militia being necessary to the security of a Free State', the states by an amendment to the constitution, have imposed a restriction that Congress shall not infringe the right of the 'People to keep and bear arms'. The chief executive officer of the State is given power, by the constitution, to call out the militia, to execute the laws, suppress insurrection and repel invasion. This would be a mere barren grant of power unless the State had power to organize its own militia for its own purposes. Unorganized, the militia would be of no practical aid to the executive in maintaining order and in protecting life and property within the limits of the state. These are duties that devolve on the state and unless these rights are secured to the citizen, of what worth is the State Government? Failing in this respect it would fail in this chief purpose. But what reason is there why a state may not organize its own militia for its own purposes? As we have seen, the state has the power of concurrent legislation with the national government over the militia, when not in the actual service of the United States, within limits quite accurately defined in law as well as in the decisions of courts, both State and Federal. Certainly Congress had not exclusive jurisdiction over the militia not actually employed in its service."

"It is no valid objection to this act of the legislature that it does not require the entire militia of the state to be enrolled as 'active militia.' Counsel do not wish to be understood as claiming that no militia law is valid unless it provides that each and every male inhabitant of the specified age should at all times be armed and equipped and engaged in drilling and maneuvering. But the argument made is, that the performance of military service in times of peace cannot be legally confined to a select corps consisting of a limited number of volunteers to the exclusion of all other able-bodied male residents of the state. The argument admits of several conclusive answers that may be shortly stated:

"1st. It is a matter dependent on the wisdom of Congress whether it will provide for arming and dis-

ciplining the entire body of the militia under any law, State or Federal, to demand as a matter of right that arms shall be placed in his hands."

"2nd. It is with the legislative judgment of what number the active militia of the state shall consist, depending on the exigency that makes such organization necessary."

"As we have seen, the matter of organizing the militia when not in actual service, but for the purpose of training, under the act of Congress, into divisions, brigades, regiments, battalions and companies, shall be done as the state legislature may direct. In respect to the number of men that shall compose a company, the language of the United States law is 'each company may consist of sixty-four privates;' but it is not made imperative. The same may be said as to the omission in the State Law to provide for the appointment of a major-general. Such an officer might find no appropriate position in the active militia of the state. Upon the requisition of the President upon the state executive for the militia for active service in the Union. It is then made the duty of the militia, or such portion as the President may direct, in conformity with the acts of Congress. In that event, under the act of 1798, each company shall have from sixty-four to eighty-two privates. In a complete organization of the militia, such as the executive of the state is authorized to make on the requisition of the President or otherwise, a major-general would be an appropriate and necessary officer."

"An objection broader in its scope than either of those noted is, that the active militia organized under the statute comes within the prohibition of the second clause. Section 10, Article 1 of the Constitution of the United States, which withhold from the states the power to keep 'troops' in time of peace. Our understanding is, the organization of the active militia of the state conforms exactly to the definition usually given of militia. Lexicographers and others define militia and so the common understanding is, to be 'a body of armed citizens trained to military duty, who may be called out in certain cases, but may be kept on service like standing armies, in time of peace.' That is the case as to the active militia of this state. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it. Such an

organization, no matter by what name it may be designated, comes within no definition of 'troops,' as that word is used in the constitution. The word 'troops' conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army. The organization of the active militia of the state bears no likeness to such a body of men. It is simply a domestic force as distinguished from regular 'troops' and is only liable to be called into service when exigencies of the state make it necessary."

"The fact that men comprising the active militia are required to be sworn to obey the 'orders of the commander-in-chief and such other officers as may be placed over them,' is made a ground of unfavorable comment. The oath the militia are required to take in the State of Illinois, is to 'support the constitution thereof.' Obviously, the militia are bound to observe the orders of the Governor, when they are in the service of the state, and not in actual service of the United States. And why should they not observe the orders of the Governor? He is, by the state constitution, made the commander-in-chief of the militia when not in service of the United States. An intention to provide that the militia shall be subject to the orders of the Governor, when in the actual service of the Union, should not be imputed to the legislature when a contrary construction, which is clearly warranted by the context, would hold the law a constitutional enactment. This principle was recognized and declared in Middleport vs. Aetna Insurance Co., 82 Ill. 562."

Dunne vs. People, 94 Ill. 124.

CAN THE FEDERAL GOVERNMENT DIRECT HOW THE STATE SHALL ORGANIZE ITS NATIONAL GUARD?

In our opinion, it is entirely beyond the power of the Federal Government to interfere with the ORGANIZED MILITIA of the various states IN TIMES OF PEACE as to the manner of organization adopted by the state, and when the militia is not, IN ANY SENSE, in the service of the Federal Government.

Before proceeding to consider the various aspects of this question presented, it would necessarily follow, that if the

Federal Government, would interfere with the organization of the militia by the state, it could dictate to the various states the number of men which they would be required to enlist and the organizations into which these men should be formed.

Without qestion, in time of insurrection or war, the Federal Government would have the right to call upon the various states to furnish such quotas of troops as might be alloted to such a state upon a basis that would involve a similar allotment or a proportional allotment to the other states upon the basis of population.

If such power of the Federal Government exists with reference to the organization of the militia of this State, it is derived from the following provisions of the Constitution of the United States. Article 1, paragraph 8:

"The Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

From this section Congress especially reserves to the states respectively the APPOINTMENT OF THE OFFICERS OF THE MILITIA AND THE AUTHORITY OF TRAINING THE MILITIA according to discipline prescribed by Congress.

Then, if any power exists to make such changes as are suggested in the organized militia, it must come about by reason of employment of these words:

"And the authority of training the militia according to the discipline prescribed by Congress."

The preceding part of this section clearly relates to the use of the militia in enforcing the laws of the Union, suppressing insurrection, and repelling invasions, and does not pretend to go further.

With respect to the other proposition in this case—the right of the National Guard to be used in foreign war, as such—counsel can find nothing in the way of decisions. It does not appear that any court has ever been called upon to decide the direct question. It turns upon the constitutional provision contained in Article 1, Section 8, Paragraph 15, just quoted, that "Congress shall have the power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.'.

It would appear that the ancestors of our nation, being a liberty loving people, who had themselves sought a new world for the purpose of the enjoyment of ther individual freedom and liberties, purposed to limit the future military activities of the nation to the necessity of public defense, and thus provided in effect a prohibition upon the part of Congress from engaging in foreign wars for conquest.

Whether it was or was not a wise act upon the part of our forefathers to cause such a provision to be written into the fundemental law of our land or not, is beside the point; such being the law. It should be construed and enforced as it is written. The surest and most immediate way to obtain the repeal or amendment of an unwise constitutional provision, is not to evade it, but to enforce it. And, it being clear that this was the intention of Congress, it is eminently proper that this Court should construe this provision; that if such provision be prohibitive, such amendment be made seasonably, in time of peace.

In time of war it may be too late to set about a time consuming effort to amend the constitution.

And upon these several grounds we respectfully submit that the judgment of the District Court should be reversed.

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